

RAPE IN MALIKI LEGAL DOCTRINE AND PRACTICE (8TH–15TH CENTURIES C.E.)¹

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Abstract

This paper draws on a series of texts written by jurists of the Maliki School of Law between the 8th and the 15th century. The variety of these sources and their examination in chronological order makes it possible to sketch different stages of elaboration and observing the relationship between doctrinal development and legal practice within the Maliki School of that period. My conclusion is that Maliki doctrine on rape was far from being monolithic, and that it changed over time as a result of a series of efforts to accommodate social demands and on the grounds of rationality, equity and justice.

In this paper I present the Maliki doctrine on rape drawing on a series of legal sources written between the 8th and the 15th century.

I became interested in this subject when I came across some fatwas involving claims of rape issued by Andalusí and Maghribí jurists from the 11th and 12th centuries. When I tried to go deeper in

¹ This paper is the third in an ongoing research on rape in Maliki legal doctrine and practice in al-Andalus and the Maghrib, which I have carried out within two research projects: “Violence and punishment in pre-modern Islamic societies (al-Andalus and the Maghrib)” and “Cruelty and compassion in Arabo-Islamic literature: a contribution to the history of emotions” both funded by the Spanish Ministry of Education (BF 2002–00075 and HUM2006–04475/FILO). The previous two papers were published in Spanish: D. Serrano Ruano, “La violación en derecho malikí: doctrina y práctica a partir de tres fetuas de los siglos X a XII d. C.”, *Mélanges de la Casa de Velázquez*, Nouvelle Série, 33/1 (2003), 125–48; *idem*, “Doctrina legal islámica sobre el delito de violación: Escuela Malikí (ss. VII–XV)” in M. Calero (ed.), *Mujeres y Sociedad Islámica: Una Visión Plural* (Málaga: Universidad, 2006): 145–72. The present paper is an amplified and updated version of the second one. Its results were presented at the Fifth International Conference on Islamic Legal Studies “Lawful and Unlawful Violence in Islamic Law and History”, Harvard Law School, September 8–10, 2006.

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the contents of these fatwas, I realized that almost nothing had been published about rape in pre-Ottoman Islamic societies which, apart from the legal and sociological value of the texts, convinced me of the need to go further.

In recent times, however, and after the efforts to reenact Islamic classical penal law in countries like Sudan and Pakistan, the classical Islamic doctrine on rape has received some attention among Human Rights associations like Karamah; Muslim Women Lawyers for Human Rights, Sisters in Islam and Women Living under Muslim Laws. They all denounce that in cases of unlawful sex (*zina*) and rape, the statutory punishments (*hudud*) are being implemented to the detriment of women. Maliki doctrine is mentioned mainly because of its admission of pregnancy as valid proof of *zina*.² The aim of this paper, however, is not to defend the Malikis but to show that their doctrine on rape was far from being monolithic, and that it changed over time as a result of a series of efforts to accommodate social demands and on the grounds of rationality, balance and justice.

1. THE MALIKI LEGAL DOCTRINE ON RAPE

1.1. Terminology

Maliki jurists refer to rape almost indistinctly with the verbs *istakraha* (to force, to compel, to coerce) and *ghasaba* or *ightasaba* (to take away by force, to violate, to rape). The use of the verb *ghaba* followed by the particle *‘alā* appears rather frequently with the sense of abducting a woman and carrying her to a lonely place where the rape is perpetrated. A rape that takes places in such circumstances is also referred to with the verb *ghalaba* followed by the particle *‘alā*. In some contexts, the verb *asaba* is used with the meaning of rape as well. Other related verbs are *iftadda* and *iftara‘a* (to deflorate), and *afdā*, used to refer to a man who tears a woman’s vagina.

² But in the case of Karamah, not for its awarding the victims the right to receive their proper bride-price. See “Zina, Rape, and Islamic Law: and Islamic Legal Analysis of the Rape Laws of Pakistan”, a position paper, http://www.karamah.org/docs/Zina_article_Final.pdf, online 28–08–06.

1.2. *The Sources*

Leaving apart the treatises on Islamic legal methodology (*usul al-fiqh*), in Islamic law it is difficult to establish a clear cut distinction between “doctrinal” and “practical” works -the former presenting the relevant doctrine for a given subject matter and the latter showing how this doctrine is applied to actual cases. Rather, the contents of the books we consider basic doctrinal references (e.g. the *Mudawwana* of the Tunisian scholar Sahnun) use to consist of a casuistry that has not lost all the traces of its having originated in daily practice. The reader not familiar with Islamic legal literature has to be reminded also that the fact that a work is attributed to a given jurist does not always mean that he is the author of its full contents. A most illustrative example in this connection is the already mentioned *Mudawwana* of which Sahnun is considered the author. However, the *Mudawwana* is made up of opinions issued by Malik b. Anas at the request of his disciple Ibn al-Qasim, and of personal opinions of this latter, all of which was collected by Ibn al-Qasim and subsequently “edited” and given its final shape by the latter’s disciple, Sahnun.

The Maliki doctrine on rape discussed in this paper draws from several kinds of sources: 1) compilations of Maliki jurisprudence such as the *Muwatta’* of Malik b. Anas (considered the earliest compilation of Maliki law), the *Mudawwana* of Sahnun (actually the most authoritative compilation of Maliki doctrine for Andalusī Malikis), and *al-Nawadir wa-l-ziyadat* by Ibn Abi Zayd al-Qayrawani (the *Mudawwana*’s “alternative tradition”); 2) abridgments of Maliki jurisprudence such as the *Risala* of Ibn Abi Zayd al-Qayrawani, the *Tafri’* of Ibn al-Jallab, the *Mukhtasar* of Khalil b. Ishaq, and the *Tuhfa* of Ibn ‘Asim; 3) commentaries to early compilations of jurisprudence such as the *Istidhkar* of Ibn ‘Abd al-Barr, the *Muntaqà* of al-Baji, the *Qabas* of Abu Bakr Ibn al-‘Arabi (the three of them commentaries to the *Muwatta’*), and the *Bayan* of Ibn Rushd al-Jadd (a commentary to the *‘Utbiyya*, an early compilation of Maliki doctrine written by the Andalusī jurist al-‘Utbi); 4) treatises of compared law like the *Bidaya* of Ibn Rushd al-Hafid and *al-Qawanin al-fiqhiyya* by Ibn Juzayy; 5) collections of fatwas and actual legal cases such as *al-Ahkam al-kubrà* of Ibn Sahl, the *Ahkam* of al-Sha‘bi, the *Madhahib al-hukkam* of Muhammad b. ‘Iyad and the *Mi‘yar* of

al-Wansharisi; 5) Manuals for the instruction of *qadis* such as the *Tabsirat al-hukkam* of Ibn Farhun, etc. The Qur'an legal commentary of Abu Bakr Ibn al-'Arabi, *Ahkam al-Qur'an*, and his commentary to the *Sahih* of al-Tirmidhi are also part of the sources used in this paper.

Of all the sources mentioned, only the *Tuhfa* of Ibn 'Asim contains a chapter on rape. The relevant doctrine—usually adopting the form of opinions transmitted from earlier authorities—is scattered through different chapters and sections within these chapters, i.e. chapters on judgments (*al-aqdiya*), illegal sexual intercourse (*zina*), calumny of illegal sexual intercourse (*qadhf*), marriage (*nikah*), usurpation (*ghashb*), coercion to commit a crime (*ikrah*), and others. Nevertheless, the examination of these sources yields a rich doctrine on rape covering a vast array of cases and displaying frequent differences of opinion to which limits were set as can be observed along treatises of comparative law. Meanwhile abridgments of doctrine reflect the process through which this doctrine became increasingly fixed by restricting those areas where jurists were allowed to opt among divergent opinions.

1.3. *Main Traits of the Maliki Doctrine on Rape*

The scattered presentation of the legal doctrine on rape reveals the hybrid character with which Maliki *fuqaha*³ conceived of this crime.

A) The perpetration of a rape involves the crime of illegal sexual intercourse (*zina*). To prove *zina* either four upright witnesses who have seen the act in its most intimate details, or the confession of the perpetrator, or pregnancy are required. *Zina* is punished with a statutory sanction (*hadd*) consisting of stoning to death when the culprit is a *muhsan*³ and one hundred slashes plus one year of banishment for the non-*muhsan*. Slaves, independently whether they have been married or not, receive half the punishment established for non-*muhsans*, i.e. fifty slashes.

B) Rape entails the usurpation of the right to have sexual intercourse with the victim as well. The usurpation of a right that can

³ An adult, free Muslim who has enjoyed sexual relationships within marriage or concubinage. See *EI*², s.v. "*zina* and *zina*" [R. Peters].

be legally enjoyed only within marriage or concubinage entitles the victim to claim her proper bride-price (*sadaq al-mithl*) or monetary compensation if she is a slave, at the expense of the culprit.⁴

C) Rape implies sex without consent; therefore, the victim of a rape is exempt from the punishment of *zina*.

D) However, if the crime cannot be proved with any of the aforementioned requirements and the claimant cannot present circumstantial evidence (discussed later), the accusation is considered tantamount to *qadhf* (calumny or false accusation of illegal sexual intercourse) the punishment of which consists of eighty slashes. Moreover, if the claimant of rape who does not succeed in substantiating her accusation becomes pregnant, she is subject to the punishment for *zina*, her claim being considered implicit confession to the crime.

Rape, as Malikis conceive of it, may thus bring about financial and penal liability for the accused and and penal liability for the claimant. These liabilities vary, depending on whether the perpetrator is a Muslim or a *dhimmi*, free or slave, *muhsan* or non-*muhsan*, child or adult and of good or bad reputation.⁵ As regards the victim, there is a distinction between the free and the slave, the child and the adult, the one who is in her right mind and the one who is deranged, the one who was awoken at the moment of the assault and the one who was asleep, and the victim of good and bad reputation.

⁴ A. Sonbol notes that “modern Egyptian laws do not recognize rape as *ightisab*, preferring to deal with such cases under different titles that make the offense more acceptable in a religious/traditional context, when before modernization of law, *shari’a* courts had no qualms about recognizing *ightisab* for what it is and handling it accordingly”. See “Law and Gender Violence in Ottoman and Modern Egypt” in *idem* (ed.), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse N.Y: University Press, 1996): 17, and 285–89.

⁵ Although the diversity of terms employed by Malikis to mean reputation deserves to be studied in depth, for limitations of space, its analysis must be postponed to a future occasion.

2. BEGINNINGS AND DEVELOPMENT OF MALIKI LEGAL DOCTRINE ON RAPE UP TO THE 15TH CENTURY

2.1. *The foundations of Maliki doctrine on rape: Malik b. Anas (Medina, d. 179/796), and Sahnun (Ifriqiya, d. 240/854)*

In the earliest source of Maliki law, i.e. the *Muwatta'* of Malik b. Anas, rape appears less as a crime denounced spontaneously by the victim than as a counterclaim to reject an accusation of *zina* formulated against a woman who becomes pregnant but cannot attribute the baby she is expecting to her husband -for being either single, widow or repudiated- or to her master.

According to Malik, when a pregnant woman claims that her pregnancy is the result of a rape, "the practice among us", i.e. Medinans, (*al-amr 'inda-na*) is to punish her with the statutory sanction for *zina*, unless she has witnesses to the rape or she appeared bleeding if she was a virgin, or cried and asked for help from the people or something similar to that. However, if she can establish that she was forced, the rapist must pay her the proper bride price if she is free,⁶ virgin or non-virgin. If she is a slave, he must pay her a compensation equivalent to the decrease that the rape has produced in her worth.⁷ In Yahyà b. Yahyà's transmission of the *Muwatta'* no mention is made to sources of Malik's doctrine other than the practice of the people of Medina, Malik's main endeavour being precisely to promote Medinan practice to the level of authoritative and binding source of law. However, according to other transmissions of the *Muwatta'*, Malik's acknowledgement to the right to receive the proper bride-price drew on a decision taken by the Umayyad caliph 'Abd al-Malik b. Marwan, a variation that seems to point to a certain reluctance among Malik's disciples to accept Medinan practice as the only basis to substantiate a legal opinion.⁸

⁶ No distinction is made yet between Muslim and *dhimmi* free women.

⁷ See *Muwatta'*, transmission of Yahyà b. Yahyà al-Laythi, several editions, chapter on statutory sanctions (*Kitab al-hudud*), section on "What was transmitted about the raped woman" (*ma ja'a fi l-mughtasaba*) and chapter on judgments (*kitab al-aqdiyya*), section on "raped women" (*bab al-qada' fi l-mustakraha min al-nisa'*). Subsequently, the commentators of the *Muwatta'* introduced the technicism *qara'in* (circumstantial evidence) to qualify bleeding, shouting and asking for help.

⁸ *Kitab al-Muwatta'*, *al-nass al-kamil li-jami' abwab al-kitab*, together with *Is'af*

If the claim is accepted, it is the rapist who must be punished (*al-ʿuquba fi dhalik ʿalà l-mughtasib*) while there is no punishment for the victim. If he is a slave the liability falls on his master unless the latter wishes to “surrender him (*an yusallima-hu*)” [to the claimant.].

Regarding the victim’s prospects of marriage, not only does Malik not rule them out but states that a woman who has been raped cannot marry until she has waited three menstrual periods, the same period applying to the woman repudiated by her husband.⁹ If she is not certain whether or not she is pregnant she must wait until the doubt has been cleared up.

These are the rudiments of the Maliki doctrine on rape, which will be expanded by later jurists by including new assumptions that reflect a more accurate approach to the complexities of reality. Such a step is already visible in the *Mudawwana*.

As I have already mentioned, the *Mudawwana* consists mainly of Malik’s teachings to one of his most important disciples, Ibn al-Qasim (Egypt, d. 191/806), subsequently edited by the latter’s disciple, Sahnun. For this reason the contribution of the *Mudawwana* to the Maliki doctrine of rape uses to take the form of Malik’s opinions transmitted and eventually qualified by Ibn al-Qasim.

From a qualitative point of view, the *Mudawwana*’s most important contribution to Maliki doctrine on rape is to have improved the legal substantiation of the opinion favouring the victim’s right to her proper bride-price. This is done through Ibn al-Qasim’s endorsement of that opinion on the authority of some of the Prophets Companions like ‘Ali b. Abi Talib, Ibn Masud, Sulayman b. Yasar, Rabi’a and ‘Ata’.

From a quantitative point of view, the scope of the doctrine is extended to cover cases in which the capacity, mental or physical, of the victim is limited, and to “aggravated rape” so that sex with a minor who does not have the capacity of discernment, with a mentally handicapped woman, and with a woman who is asleep is assimilated to rape in all senses. “Aggravated rape” applies to a man who forces a woman and tears her vagina, including the possibility that the perpetrator be the victim’s husband (*fi l-rajul yufdi imra’ata-hu aw amata-hu aw taghtasib hurra aw yazni bi-ha fa-yufdi bi-*

al-Mubatta’ bi-rijal al-Muwatta’ by al-Suyuti, ed. F. Sa’d, Beyrut, Dar al-afaq al-jadida, 1981, 630.

⁹ According to the commentary of al-Zurqani (d. Cairo, 1099/1688), the groom can be the man whom the woman has accused of having raped her.

ha), in which case, the legal consequences differ from the doctrine examined so far. The opinion of Malik transmitted by Ibn al-Qasim regarding this case is that if a man forces his wife to have sex with him, tears her vagina and brutalizes her to the point of causing her death, once it is established that the cause of her death was his having sexually abused her, he has to pay her blood price at the cost of his solidarity group (*al-ʿaqila*; for Malikis, the agnates), although Ibn al-Qasim holds that it must be at the expense of the perpetrator himself. He also reports the opinion of some jurists according to whom the amount to be paid was one third of the total blood price at the expense of the perpetrator's solidarity group, and explains that the reason for this disagreement was that they assimilated tearing the vagina not to homicide but to a penetrating wound affecting the inner cavities (*al-ja'ifa*), for which one third of the total blood price must be paid.

According to Ibn al-Qasim, had the wife consented to the relationship that ended in the tearing of her vagina, no blood price would be due to her. However, he does not elaborate the case of the woman whose husband tears her vagina without her having consented to the sexual act and survives his assault. One might assume that in this case, the aforementioned opinion according to which the blood price due for a penetrating wound applies, but this is not clear to me. Ibn al-Qasim points to a discussion around whether tearing the wife's vagina was grounds for divorce, although he asserts that to the best of his knowledge, Malik had issued no opinion about this question. On the other hand, the case is not mentioned again in the texts I have examined. This seems to be a deliberate gap showing a reluctance to give the status of rape to sexual violence within marriage, perhaps to avoid a collusion with a husband's right to correct his wife and a wife's obligation to satisfy her husband's sexual demands.

As regards the free woman who is forced by a man who is not her husband and he tears her vagina, she is awarded the right to her proper bride-price plus a compensation for the damage inflicted to her. Ibn al-Qasim insists that these are two different payments, independent from each other.¹⁰

¹⁰ See *al-Mudawwana al-kubrā*, Beyrut, 1986, chapters on usurpation (*ghashb*), and statutory sanctions (*hudud*). See also chapters on divorce by agreement (*khulʿ*) and testimonies (*shahadat*).

2.2. *The classical formulation of the Maliki doctrine on rape: Ibn Abi Zayd al-Qayrawani (Ifriqiya, d. 386/996)*

Notwithstanding the authoritative character of the *Muwatta'* and the *Mudawwana*, the doctrine on rape they contain represent but the rudiments of subsequent formulations, for which, nevertheless, they paved the way. The most important qualitative and quantitative step towards the rise of a classical¹¹ formulation of Maliki doctrine on rape was taken by Ibn Abi Zayd al-Qayrawani in his *al-Nawadir wa-l-ziyadat*, a real thesaurus of legal opinions alternative and complementary to those transmitted by the *Mudawwana* and thus with a potential to be resorted to by later generations of Malikis in order to substantiate a departure from the majority opinion. Apart from the *Mudawwana* itself, the main sources of Ibn Abi Zayd are other early compilations of Maliki doctrine like the *Kitab Ibn al-Mawwaz*, the *Kitab Ibn Habib* -also known as *al-Wadiha*-, and the *Uthbiyya*, thereby incorporating the Syro-Iraqi and the Andalusí to the Egyptian branch of Malikism embodied by the *Mudawwana*. The first two, i.e. the *Kitab Ibn al-Mawwaz* and the *Wadiha* have been preserved only partially while a great part of the *Uthbiyya* is extant in *al-Bayan wa-l-tahsil*, a commentary to the *Uthbiyya* written by Ibn Rushd al-Jadd and to which I will return later.

Ibn Abi Zayd's opening statement reminds the reader that in his *Muwatta'* Malik had specified that the '*hadd* for the rapist and proper bride-price for the victim' "is a rule that we, i.e. Madinans, accept unanimously (*inna-hu l-amr al-mujtama'* '*alay-hi 'inda-na.*)" This insistence seen in connection with the above mentioned improvement of the legal substantiation of the doctrine, shows that the most important achievement of early Maliki doctrine on rape was to establish the victim's right to receive her proper bride-price, a right that having no textual precedent in the Coran or in Prophetic tradition,¹² did not prevail without difficulties. In fact, the doctrine was not accepted by other jurists like Abu Hanifa.

¹¹ By classical, I understand here a formulation of doctrine with enough entity to respond to the complexities of Islamic social organization and practice and providing the basic structure to later re-elaborations of the doctrine. On the other hand, the 10th century C.E. is considered by students of Islamic law to be the period during which it adopted its classical form.

¹² See a series of *hadiths* in which the Prophet is reported to have averted the *hadd* punishment from a woman who was raped in his time and to have applied

From a qualitative point of view, the doctrine transmitted and systematized by Ibn Abi Zayd al-Qayrawani in his *Nawadir* is relevant for his reflecting, for the first time, on coercion (*ikrah*) as a valid excuse to become exempt from the punishment for *zina*. This is an exemption he accepts in the case of the woman but rejects in the man with the argument that penetration entails erection, and therefore, to have experienced sexual pleasure (*lidhdha*). Fear for one's life, hunger and thirst are mentioned as valid causes of coercion so that a woman who agrees to have sexual intercourse with a man because of hunger, will be considered coerced (*mukraha*).¹³

Half-way between coercion and consent is deceit or trickery which may be argued to obtain exemption from the punishment for *zina* only when the victim lacks full capacity of discernment by virtue of age or mental handicap. The victim of deceit (*yukhdha'*) is entitled to her proper bride-price if it were credible that a woman like her can be deceived. Otherwise she will have no right, even if she has not yet menstruated for the first time.

When lack of consent has unexpected consequences for the assailant, as in the case of a woman who injures a man who is harassing her, e.g. hitting him with a stone, no action will be taken against her.¹⁴

it to the perpetrator; but without mentioning that the perpetrator had to pay her the bride-price in al-Tirmidhi (209/824–279/892), *al-Jami' al-Sahih, kitab al-hudud, bab ma ja'a fi l-mar'a idha ustukrihat 'ala l-zina*.

¹³ *Al-Nawadir wa-l-ziyadat 'ala ma fi l-Mudawwana min ghayri-ha min al-ummahat*, ed. 'A. al-F. M. al-Hulw, Beirut, Dar al-Gharb al-Islami, 1999, X, 265 and XIV, 257–67. Ibn Rushd al-Jadd classifies hunger as a *shubha* which can prevent the implementation of a *hadd* punishment for *zina*. See D. Serrano Ruano, "La lapidación como castigo de las relaciones sexuales no legales (*zina*) en el seno de la escuela Maliki", *Al-Qantara* 26/2 (2005), 449–73, at 463.

¹⁴ Nevertheless, little attention is paid to resistance in the *Nawadir* and later Maliki compilations of jurisprudence. The same can be said concerning the course of action that is expected of those who witness to an abduction or rape. Some treatment of the former subject can be found, for example, in a moralizing work entitled *Dhamm al-hawa'* (The censure of passion) by the Hanbali Ibn al-Jawzi (d. 597/1200), ed. 'I. Faris al-Harastani and M.I. al-Zughli, Beirut, Dar al-Jil, 1999 and which contains a chapter on "women who refused to surrender to depravity" (I owe this reference to Manuela Marín). The need to intervene was a legal obligation for a person who witnesses an abduction or hears the cries for help of a woman who is being forced, according to some treatises on the fulfillment of the principle of "Commanding right and forbidding wrong." Among them, according to the Egyptian Maliki Abu Talib 'Umar Ibn al-Rabi' al-Khashshab

To extend the scope of the doctrine, Ibn Abi Zayd elaborates further on the status and the age of the perpetrator, and introduces the case of defloration.

When the perpetrator is a slave, his punishment consists of fifty lashes, i.e. half the number of lashes corresponding to a free non-*muhsan* Muslim culprit of *zina*. However, contrary to the latter, the slave is not subject to one year banishment. A slave's confession of rape is accepted only if he presents it immediately after having committed the crime provided that the victim, at the moment of denouncing him, "holds him" (*wa-hiya muta'alliqat^{un} bi-hi*)¹⁵ and is still bleeding. If some time has elapsed since he committed the crime, the slave's confession will not be accepted.

If the owner of a guilty slave does not wish to pay the victim's bride-price, Ibn Abi Zayd suggests the sale of the slave—after the *hadd* penalty (i.e. fifty lashes) is applied to him—and hand the price over to the victim on account of her bride-price. Drawing on the precedent established by 'Umar b. 'Abd al-'Aziz and 'Abd al-Malik b. Marwan, Ibn Abi Zayd states that the sale must be carried out in a place different from that in which the crime took place, a measure which, as he observes, is meant to prevent the perpetrator from dishonoring his victim [any more] (*li-tabta'id 'an-ha ma'arratu-hu*).

Ibn Abi Zayd reports that according to the Egyptian jurist Ibn 'Abd al-Hakam (d. 210/826) a Christian who abducts a Muslim woman with the intention to have sexual relations with her must be crucified. Ibn Abi Zayd explains that the reason why this punishment differs from that established for the Muslim fornicator is that the crime committed by the *dhimmi* entails breaking-off the pact under which he lives in territory governed by Muslims. Difference of opinion is reported when the woman raped by the *dhimmi* is also

(d. 345/956) "the believer is obliged to answer to calls for help to prevent the commission of a violent crime. If he cannot get the attention of the authorities, he is entitled to burst into the house where murder or rape are being perpetrated and even to kill the aggressor if need be." See M. Cook, *Commanding right and forbidding wrong in Islamic thought*, Cambridge, University Press, 2000, 379–81. See also Ibn Rushd al-Jadd, *Fatawà Ibn Rushd*, ed. M.T. al-Talili, Beyrut, 1987, III, 1627.

¹⁵ This is the first time that the requisite of the woman's "holding" the accused at the moment of presenting her claim, is mentioned, a reference that Ibn Abi Zayd al-Qayrawani reports from the *Kitab Ibn al-Mawwaz*. On "holding the accused" see *infra*.

a *dhimmi* or a slave Muslim. In the latter case, according to Ibn Abi Zayd, he must not be executed since even if he had killed her, he could not be executed, while Ibn al-Qasim held for executing him.¹⁶

Be that as it may, to prove that a *dhimmi* has committed *zina* four witnesses are required as they are in the case of the free Muslim. Ibn Abi Zayd mentions a text from the *ʿUtbiyya* according to which Ibn al-Qasim used to say that two witnesses were enough, although subsequently he abandoned this position and subscribed to the one according to which four were required. This latter position was the one adopted by Sahnun. It seems that Ibn al-Qasim's change of mind created confusion among the jurists of subsequent generations so that some believed that four witnesses were necessary both to execute the *hadd* punishment for *zina* and to establish the obligation to pay the proper bride-price to the victim.

The penal and financial liabilities derived from rape vary significantly when the perpetrator is not an adult and when there is no penetration with the member but defloration with a finger. Ibn Abi Zayd al-Qayrawani transmits the opinion of Ibn al-Mawwaz (Syria, d. 281/894) according to which when a boy penetrates a girl with his member or deflowers her with his finger, the jurist must consider which would have been the opinion of the *imam* and the people of knowledge. In a case similar to that, the caliph ʿAbd al-Malik (ruled from 65/685 to 86/705) sentenced (*hakama*) to the payment of forty dinars while ʿIyad b. ʿAbd Allah, *qadi* of Egypt for ʿUmar b. ʿAbd al-ʿAziz (ruled between 98/717–101/720) sentenced to the payment of fifty dinars after the caliph ordered him to reflect on this issue (*faʿwada ʿUmar ilay-hi l-ijtihad*).

Being a minor, the perpetrator cannot be punished with a *hadd* but with a corrective or with a reprimand (*ʿitab*). Some, Ibn Abi Zayd reports, assimilate defloration committed by an adult to a penetrating wound (*jaʿiha*)-like tearing a woman's vagina- for which the third of the total blood price is due. Others held in favor of paying the victim an amount equivalent to the decrease that the loss of her virginity would entail in her proper bride-price. As

¹⁶ This latter opinion was subsequently endorsed by the Andalusī jurist Ibn Rushd al-Jadd who argued that slavery does not cancel the inviolability of Islam (*hurmat al-islam*). See *al-Bayan wa-l-tahsil*, several editors, Beyrut, 1984–1987, 1988², XVI [vol. ed. by A. al-Habbabi], 232–3.

regards Ibn Abi Zayd's own opinion, he advocated the view according to which defloration be considered like a defect in a woman's genitals that can render a marriage contract null and void, or entail a decrease in her bride-price, and that this latter be considered the basis on which the compensation due to the victim must be calculated.

Regarding proof of rape, Ibn Abi Zayd adds witness testimony that the woman had been abducted by the accused or that at a certain moment the accused stayed alone with his victim (*ikhtalā bi-ha*). This latter kind of testimony can be taken to punish the accused with a corrective and to oblige him to pay the victim's proper bride-price, but not to apply him the *hadd* for *zina* (however, see *infra*).

Be that as it may, it was very difficult to provide witness testimony. Therefore, for a claim of rape to succeed, circumstantial evidence was crucial. Let's recall that substantiating a claim of rape with circumstantial evidence, namely bleeding if the victim was still a virgin and to appear crying and asking for help to the people or "something similar to that," was already accepted in the *Muwatta'*. To this the *Nawadir* add the fact that, at the moment the victim declares publicly that she has been raped, she is "holding the accused".¹⁷ As we have seen above, this requirement is mentioned in connection with a free woman who accuses a slave of having raped her and in which the fact of holding him is directly related with the acceptance of his confession not with the acceptance of her accusation. It is also important to keep this specific context in mind since slaves' mobility is generally much more limited than that of free men so that it must have been easier to catch a slave than a free man. However, this fact seems to have passed unnoticed.

Women's testimony is not valid to establish a *hadd* crime, however it is not devoid of evidential force in matters of sexual crimes. The testimony of women could be required to establish virginity so that if a woman claimed that she had been raped or deflowered

¹⁷ In this connection it is interesting to recall an episode in *El Quijote* in which a woman appears before a judge pulling a man whom she accuses to have raped her and thus, dishonored her. I owe this reference to Maribel Fierro. See Miguel de Cervantes Saavedra (1547–1616), *El ingenioso hidalgo don Quijote*, ed. with notes and an index by T. Latrop, Indian Road, European Masterpieces, 2003, part II, chapter XLV.

but the testimony of women yielded that she was still a virgin, her claim had to be rejected, even when the accused's reputation was very bad. However, according to the opinion of Asbagh transmitted by Ibn Abi Zayd, her claim prevails over the women's testimony if she is free (see below).

Most of the circumstantial evidence mentioned so far consists of signs that the victim has shown herself up (*balaghat fadihat nafsi-ha*, or *fadahat nafsa-ha*), i.e. declared in public that she has been raped, and given that this is something no woman would do except with sound reasons, in the absence of witness testimony, her showing herself up creates a presumption that she is telling the truth.¹⁸

Ibn Abi Zayd remarks that when a woman accuses a man of rape at the very moment while she is holding him, the fact that either she or the accused are legally disqualified because of age does not cancel the financial and penal liabilities derived from the crime and so, the accused will be subject to a corrective at the judge's discretion and she will be entitled to her proper bride-price for having showed herself up.

In practice, however, reputation plays a role in creating presumptions of credibility as relevant as that played by the claimant's "showing herself up". Indeed, the most relevant doctrinal shift represented by the *Nawadir* is that circumstantial evidence is no longer treated as a set of indications with an autonomous evidential force, as they appeared in the *Muwatta'* and the *Mudawwana*, but tempered by reputation or even contingent upon it. This process is operated through Ibn Abi Zayd's quotation of a number of opinions issued by early Maliki jurists¹⁹ in which they appear to weigh different combinations of circumstantial evidence and reputation that ultimately render the relevant doctrine almost impracticable for the average jurist. From this doctrine, nevertheless some other conclusions can be drawn.

The general rule is that only a man of bad reputation can be subject to a corrective when only circumstantial evidence can be presented against. Concerning the payment of the proper bride

¹⁸ See also D. Santillana and E. Guidi, *Muhtasar. Sommario del diritto malechita*, Milan, 1919, II, 437 n. 118, commenting the reference to "holding the accused" at the moment of presenting her denounce in Khalil b. Ishaq's *Mukhtasar*, a source written three centuries later.

¹⁹ See a more detailed presentation and discussions of these opinions in Appendix I.

price, the accused's good reputation excludes the claimant's right to the proper bride price, although if she holds him, she becomes exempt from any punishment in case of pregnancy. If she does not hold him, she may be subject to the punishment for calumny, unless she is pardoned by the accused, and according to some opinions, for *zina* as well. With respect to the accused of bad reputation, apart from receiving a corrective at the *qadi*'s discretion, he must be obliged to pay the victim's proper bride-price while if the accused is of good reputation, it is the claimant who is punished for having falsely accused him of *zina*.

The balance of presumptions between the claimant's showing herself up by holding the accused and the accused's good reputation is broken when she is a slave and the accused is legally disqualified, since in such an event, he must receive a corrective and she the statutory sanction for calumny (*qadhf*) without that she has a right to be pardoned by the accused (*al-ʿafw*), because, in the case of the slave, the one who benefits from the accused's pardon is her master, unlike the free woman, who can benefit from that pardon herself. However if the accused by the slave has reached puberty (*halim*), she will not be punished with *hadd*, a doctrine which, as Ibn Abi Zayd points out, comes from Malik.

With respect to the general rule on pardon, Ibn Abi Zayd reports the opinion of Ibn al-Qasim according to which once the accusation has reached the authorities, no pardon is possible.²⁰

Of the opinions cited by Ibn Abi Zaid two deserve special attention. The first is that of Rabi'a, one of Malik's masters, according to whom the mere public claim of rape without signs that the rapist stayed alone with his victim, or looked at her or that she cried for help when he abducted her is not enough to create the doubt (*shubha*) that prevents the implementation of the punishment for *zina* in case of pregnancy (*haml*), since it is possible that she claimed to have been raped in order that people took pity on her pregnancy (*mimma ushfiqat min-hu*). According to Ibn Abi Zayd, an opinion similar to that was issued by Yahya b. Sa'id, another master of Malik, in which the technicism *'alama*, sign or indication, appears for the first time. According to Yahya b. Sa'id, it is not enough that the claimant of a rape asked for help but she has to provide a sign

²⁰ See below, section 2.4.

(*alama*) that explains why she did it. He seems to be concerned by the possibility that a woman pretended to have been raped by asking for help, revealing a stage of legal development in which the fact that the claimant showed herself up was not yet considered a presumption of credibility. Moreover, he says, the accused “must be found with her, or something similar” (*fa-yujad ma^ʿ-ha*), in which case he must be punished (*yu^ʿaqab*), two requirements that had not been mentioned in the *Muwattaʿ* and that made things extremely difficult for the claimant. Ibn Abi Zayd’s mentioning these opinions stresses the progress from the harshness of Malik’s masters to the more sensitive attitude towards rape victims reflected in the *Muwattaʿ*.

Ibn Abi Zayd deals also with the case of multiple liabilities. When abduction with the intention to rape, or rape is perpetrated by several persons, all those whom the victim accused to have penetrated her will be obliged to pay her proper bride price, provided that she takes the oath to her claim. However, *hadd* punishment will not be established for them or for her.

So far regarding Ibn Abi Zayd’s relevant achievement in Maliki doctrine on rape. Two minor contributions, also dating from the 10th century, can be added to it:

The question of the slave victim of a rape who becomes pregnant, only cursory dealt with by Ibn Abi Zayd in his abridgment of Maliki jurisprudence known as the *Risala*²¹ is treated in some more detail by his contemporary, the Basran Maliki Abu l-Qasim Ibn al-Jallab (d. 378/988). According to him, if a man rapes a slave and she becomes pregnant, her baby will be a slave of her master. If the baby dies when she gives birth while she is in the hands of a third man, this man will have no obligations toward her. However, if the mother dies but the child survives, the master must be given the opportunity to choose between keeping the child and losing the right to the value of the mother, or taking the value of the mother and leaving the child. If the master finds both alive, he is entitled to both, while if both die, he is entitled to the value of the mother but to nothing for the child.²²

²¹ *Al-Risala*, ed. and fr. translation L. Bercher, Algiers, 1968, 268/269. I owe this reference to Cristina de la Puente. In this work, rape is discussed in the chapter on blood crimes and statutory sanctions (*bab fi l-dimaʿ wa-l-hudud*).

²² *Al-Taqfi^ʿ*, Beyrut, Dar al-gharb al-islami, 1987, chapter on judgments (*kitab al-aqdiya*).

The way how doubt (*shubha*) and suspicion may operate in practice is illustrated by a fatwa issued by another Tunisian jurist, al-Qabisi (d. 404/1014) concerning the case of the daughter of a man, who disappeared for three days. When she was found, her sister brought her to the judge (*fa-marrat bi-ha ukhtu-ha ilà l-hakim*). He questioned her and she answered: "my paternal cousin handed me over to the Sinhaja (*Ibn 'ammi a'ta-ni li-Sinhaja*).” Subsequently the judge questioned her cousin and he said: "I have never seen her, I don't know her, between both of us there is no kinship and I am not of those who can be accused of something like that", she having accused him of having deflowered her (*iftara'a-ha*). Al-Qabisi answered: "Her claim does not entail any financial obligation for the boy (*al-fatà*). With respect to the penal liability, if witnesses testify that he is honest and upright he will not have to face imprisonment nor any other punishment. However if he were suspicious and the judge saw fit to imprison him and to warn him in order to put an end to the evil that characterizes him, he is entitled to do so. As regards the claim of the girl, it is not accompanied by any sign of having been raped by this boy nor is there in the text of your query anything that prevents from thinking that she consented to what happened to her. Therefore, reflect upon it and try to gain certainty about it since statutory sanctions cannot be implemented in cases of doubt (*al-shubuhāt*) but have to be removed."²³

2.3. *The further elaboration of the Maliki doctrine on rape in 11th century: Ibn 'Abd al-Barr, al-Bajī and Ibn Sahl*

In the 11th century, an elite of Maliki jurists like Ibn 'Abd al-Barr (al-Andalus, d. 463/1071) and Abu l-Walid al-Bajī (al-Andalus, d. 474/1081) initiated a reform of the school doctrine that was continued in the subsequent century by Ibn Rushd al-Jadd, Abu Bakr Ibn al-'Arabi and Ibn Rushd al-Hafid.²⁴ Also for this period we have the earliest preserved collections of fatwas and actual legal

²³ The fatwa is transmitted by al-Wansharisi in his *al-Mi'yar al-mu'rib*, ed. M. Hajji, Rabat, . . .-1981, IX, 573.

²⁴ Further on this process in M. Fierro, "Proto-maliks, Maliks and reformed Maliks in Al-Andalus" in P. Bearman, R. Peters and F. Vogel (eds.), *The Islamic School of Law: Evolution, Devolution and Progress*, Cambridge-MA, Harvard University Press, 2005, 57–76, esp. at 70–75.

cases, allowing us to observe with more accuracy the relationship between legal practice and doctrinal development.

The Andalusī jurists of the 11th century filled gaps and nuanced particular aspects of Maliki jurisprudence on rape they had received from earlier jurists.

In his *Kitāb al-istidhkar*, a commentary “to the traditions and legal opinions contained in the *Muwattaʾ*,” Ibn ʿAbd al-Barr recalls rather vehemently the prohibition to punish a woman who has been forced to commit *zina*: “her blood is forbidden according to the *Qurʾan* and according to the Sunna and it is not licit to shed her blood nor is it permitted except if there is certainty (*bi-yaqin*),” a concept that he defines as follows:

“Certainty is produced by a decisive testimony (*al-shahada al-qatiʿa*) or by confession. In the absence of this two requirements, it is better for the *imam* to make a mistake about pardoning than about punishing (*fa-la-an yukhtiʾa l-imam fi l-ʿafw khayr^m la-hu min an yukhtiʾ fi l-ʿuquba*).”

This assertion seems to apply only to the claimant. Ibn ʿAbd al-Barr continues that “when the suspicion is authentic, no objection can be raised if the *imam* implements a discretionary punishment or puts the accused in jail, or something like that (*fa-idha sahhāt al-tuhma fa-la harj ʿalay-hi fi taʿzīr al-muttaham wa-taibī-hi bi-l-sijn wa-ghayri-hi*). That he may be referring to the claimant too is unlikely given that, to judge by the doctrine examined so far, no jurist requires that the claimant be punished with a corrective. Contrary to previous jurists’ stress on the requirement to demonstrate the claim to avoid the punishment, Ibn ʿAbd al-Barr shifts the emphasis to the need to establish that she has committed *zina*. This move might be seen as an attempt to balance the bias against the claimant of rape adopted by Maliki doctrine during the 10th century.

A less relevant contribution, deserving to be mentioned anyway, is Ibn ʿAbd al-Barr’s completing Malik’s doctrine on marriage with a raped woman. He focuses on the consequences of concluding such a marriage before exhausting the three waiting periods (*ʿidda*) required to verify that she is not pregnant and asserts that in such a case, she will never again be licit for the man, even if a baby were born as a result of their relationship.²⁵

²⁵ See Ibn ʿAbd al-Barr, *al-Istidhkar*, ed. S.M. ʿAta and M. ʿA. Muʿawwid, Beirut, Dar al-kutub al-ʿilmiyya, 2000, VII, 509–13.

Al-Baji is the author of another commentary of the *Muwatta'* entitled *al-Muntaqà*, in which he elaborates further on the question of the waiting period that must be observed before marrying a woman who has been raped. He specifies that this requirement applies also in a non Islamic land, both for free and slave Muslim women, although for this latter the waiting period in an Islamic land is one single menstruation, unless there is uncertainty as to whether she is pregnant or not.²⁶

Al-Baji comments on Malik's doctrine on the free woman who is raped by a slave and specifies that whenever she is entitled to her proper bride-price if she swears her claim, she must be given the option either to receive the bride-price or claim the property of the slave, regardless of the slave's allegations since, in al-Baji's opinion, the slave's confession is relevant only to decide whether or not he must be punished with a *hadd*, not to take him out of his master's property. However, if she claims the slave, his master has the right to recover him if he pays the price established for him.

The Andalusis al-Sha'bi (d. 499/1106) and 'Isà Ibn Sahl (d. 486/1093) are the authors of the first extant Maliki collections of actual legal cases, which does not mean that earlier legal cases have not been preserved elsewhere, e.g. in the *Mi'yar* of al-Wansharisi (d. Fez, 914/1508).

Al-Sha'bi transmits a case which is relevant since it is the victim who denounces out of her own free will, that she has been raped by a man of bad reputation. At the moment she presented her claim, she was bleeding, asking for help and holding the accused, who denied the accusation. The case was submitted to the Cordovan mufti Ibn al-Fakhkhar (d. 419/1019) who issued a fatwà that is fully in line with the doctrine contained in Ibn Abi Zayd's *Nawadir*: she is exempt from the punishment of *zina* and calumny and he must be punished with a corrective according to the *qadi's* discretion. However, the mufti leaves the question whether or not she is entitled to her proper bride-price up to the two divergent opinions held by 'Abd al-Malik b. Habib (al-Andalus, d. 238/852) and Ibn al-Qasim. Be that as it may, and even though we have no indication about the *qadi's* final decision, the case documents a certain

²⁶ *Kitab al-Muntaqà, sharh al-Muwatta'*, Cairo, 1983, VII, 146.

degree of observance of the Maliki doctrine on rape in al-Andalus, as early as the 10th century.

Ibn Sahl provides an earlier example of aspointaneous claim of defloration. From a doctrinal point of view this second case is much more relevant than the former, for it is transmitted with a long commentary by Ibn Sahl who introduces the question of the claimant's reputation—so far discussions had focused on the accused's reputation. The case is also illustrative about the interaction between doctrine and practice in Islamic law, and shows how doctrinal growth results from a casuistry issued directly from the legal practice rather than from intellectual exercises devoid of any connection with reality.

According to Ibn Sahl's account of the facts, a woman appeared in court and claimed that a man had deflowered her. It seems plausible that her intention was to oblige him to marry her. Several witnesses testified before the *qadi*, presumably of Cordova, to the accused's good reputation and to her bad reputation (*wa-shahada 'indi anna hadhi-hi l-jariya mansub ilay-ha al-radà*). Two Cordovan muftis issued fatwas about this case: Abu Salih Ayyub b. Sulayman (d. 302/914) and Muhammad Ibn Lubaba (d. 302/914–5). The former held for punishing her with eighty slashes for calumny while the latter considered her claim an implicit confession of *zina* and consequently held for punishing her both with eighty slashes for calumny and, unless she withdrew her claim, with another one hundred slashes for *zina*.

Ibn Sahl's commentary is important also because he elaborates on the question of suspicion, for which he draws an analogy between rape and theft, although in his argument, this analogy is implicit and is never justified explicitly (see below). He distinguishes between several levels of suspicion and drafts a table of punishments proportional to these levels of suspicion. Ibn Sahl's sources are the *Mudawwana* (chapters on divorce by agreement (*khul'*), usurpation, testimonies and the last section of the chapter on theft), and the *'Uthbiyya* (chapters on usurpation, on statutory sanctions, and on claims).

It may happen that the accused of a theft (and consequently that of a rape) is not known for being suspicious or for being of good reputation. In this case, according to Ibn Sahl, the *imam* is entitled to keep him in jail until his situation is investigated, but this cannot

last a long time since this is allowed only when the accused is of suspicious character and has been frequently accused of theft. Ibn Sahl informs us that this was the opinion of Mutarrif (Medina, d. 220/835), transmitted by Ibn Habib. Ibn al-Mawwaz subscribed the opinion of Malik and al-Layth (Egypt, d. 175/791) according to whom, the accused has to be punished with a beating when he is untrustworthy and the results of the investigation advise to do so. According to Ashhab (Egypt, d. 204–820), if the suspicion is slight, some slashes are enough to punish the accused, without that he has to be imprisoned.

When the accused of theft is untrustworthy, the obligation to swear shifts from the claimant to the defendant, notwithstanding that Muhammad Ibn al-Mawwaz transmitted from Ashhab that the claimant was obliged to swear his claim.²⁷

2.4. *The Reformulation of the Classical Maliki Doctrine on Rape: Ibn Rushd al-Jadd*

Ibn Rushd al-Jadd submitted Maliki doctrine on rape to a systematic revision according to rules of legal arguing of Islamic legal methodology (*usul al-fiqh*). This he did mainly through a commentary to the aforementioned *ʿUthbiyya*, commentary which he titled *al-Bayan wa-l-tahsil*.²⁸ As a result of his effort, the last relevant gaps were filled, some particular questions were clarified and the doctrine was given a new shape.

Ibn Rushd went a step further than Ibn Abi Zayd al-Qayrawani in restricting the possibilities of success for a claim of rape against a man of good reputation or against a man who cannot be held at the moment of denouncing him. He does not admit that the shouts and calls for help have an independent evidential force and attaches a decisive role to the requisite of holding the accused at the moment of accusing him. In his formulation of Maliki doctrine on circumstantial evidence of rape, the claim becomes contingent upon three circumstances: whether or not the claimant holds the

²⁷ Further on the cases transmitted by al-Shaʿbi and Ibn Sahl in my “La violación en derecho malikí”, section 3.

²⁸ See *Bayan*, XI [ed. M. al-ʿAraʿishi], 234–6, XIV [ed. S. Aʿrab], 198–9 and XVI [ed. A. al-Habbabi], 232–3, 310–2 and 347–8.

accused at the moment she denounces the crime, the reputation of the accused and the reputation of the claimant.²⁹

His particular position with respect to claims of rape appears to reflect a prevalence of fear for the proliferation of malicious accusations. This concern had already been expressed two centuries before by Ibn al-ʿAttar (d. 399/1009), another relevant Cordovan jurist who complained that debtors used to present false claims against their creditors,³⁰ likely with the intention to obtain exemption from their debts in exchange for withdrawing the claim.

Furthermore, Ibn Rushd filled the gap concerning the *dhimmi* who rapes a Muslim woman and she becomes pregnant of him, reporting an opinion of Ibn Habib, which the latter had transmitted from Asbagh. According to this opinion, if the *dhimmi* remains in his religion, the baby will not be attributed to him, and if he converts to Islam, the death penalty by crucifixion or by severing his head drops, but not the right of the victim to receive her proper bride price. In order that the conversion be accepted, legal validity is required without that it is necessary to verify whether it was sincere or not.

Ibn Rushd clarifies the controversy about the opinion of Ibn al-Qasim according to which the victim of a rape could claim her proper bride-price only if four witnesses testified in her favor and that if they were less than four, they would be accountable for calumny. Ibn Rushd species that if the witnesses testify that they saw a man forcing a woman to commit *zina* with him, they must be four, since they give testimony of *zina* but if they are less than four, they fall into calumny. In case they are four, the woman will receive her bride-price and the accused the *hadd* for *zina*. However, if the witnesses declare that they saw a man abducting a woman and bringing her into a house, but that they did not see him committing *zina* with her, two witnesses suffice. Their testimony plus the woman's claim give her the right to the proper bride-price and exonerates her from the punishment for *zina* if she becomes pregnant and from that for calumny if the accused is of good reputation, but if the accused denies the accusation, he cannot be punished for *zina*.

²⁹ See a more detailed presentation and discussion of this doctrine in Appendix II.

³⁰ Ibn al-ʿAttar, *Kitāb al-wathāʿiq wa-l-sijillāt*, ed. P. Chalmeta and F. Corriente, Madrid, 1983, 294–5.

Ibn Rushd also addresses the question of what is and what is not an implicit confession of rape in his comments on a passage of the *ʿUthbiyya* dealing with the subsequent case: Yahyà b. Yahyà consulted Ibn al-Qasim about a man who denounced another man for having deflowered his minor daughter.³¹ The accused denied the claim and suggested that the girl be examined by women; if they found that she was not a virgin, he would assume the liability for her. However, when the women examined the girl they found that she had been deflowered (*muftadda*) but the accused denied responsibility. Ibn al-Qasim answered that the defendant's statement "let us have her examined by the women and if they find her a non virgin I assume the liability" is not a confession (*iqrar*) since he can claim that he expected that the examination would confirm that she was a virgin as he believed, and consequently his innocence. Ibn al-Qasim stated "I think that he must not be punished nor must he pay the bride-price." Yahyà b. Yahyà inferred then that if the words of the accused did not amount to a confession, the accusation against him could be considered a calumny. Ibn al-Qasim considered the accused's reputation and said "if he is of very good reputation I think the accusation against him is a calumny" Ibn Rushd endorses the validity of all these opinions thereby sanctioning a position on which Ibn al-Qasim did not seem to be absolutely certain.

Sexual harassment of a woman—including touching her, kissing her or lifting her clothes without her consent, and chasing her—could be subject to severe punishments. Ibn Rushd's treatment of harassment focuses on a case transmitted in the *ʿUthbiyya*, and which has already been mentioned. The case gives him occasion to stress that harassment should not be punished more severely than *zina* or rape: a woman threw a stone at a man who was harassing her and injured him in his head. She started to cry and the man fled. Then the woman denounced him before the caliph Marwan b. al-Hakam (r. 64/684–65/685) who ordered that the accused be tracked down. He was easily identified by his head injury and the caliph

³¹ Minors must be represented by the father, as in this case. However, in the aforementioned fatwa by al-Qabisi it is the sister of the claimant who reports her to the judge, which might be in connection with the Berber tribal milieu from which the case seems to issue.

sentenced him to pay her one thousand dirhams. Ibn Rushd adds that the accused was put in prison and released only after his father appeared and paid the one thousand dirhams. The case had been transmitted by Malik from his master, Yahyà b. Sa'îd. According to Ibn al-Qasim, Malik found this punishment excessive and said that the caliph Marwan used to be so severe (*shadid*), that he sentenced a man denounced for kissing a woman without her consent to have his teeth pulled out. Ibn Rushd disapproved of this conduct too extending Marwan Ibn 'Abd al-Hakam's harshness to the implementation of *hudud* punishments in general (*wa-kanat fi-hi shidda fi l-hudud*).

With respect to pardon, Ibn Rushd nuances Ibn al-Qasim's aforementioned opinion stating that Ibn al-Qasim was right, i.e. no pardon is possible once the accusation (of rape or of *zina*) has reached the authorities, unless the accused wishes to conceal the issue (*illa an yurida sitr^{am}*), as it was transmitted from Malik in the *Mudawwana*. Ibn Rushd adds that in this question three opinions were in force: 1) No right of God is involved in *qadhf*, therefore the accused can pardon the person who slandered him even after the accusation has reached the authorities, 2) *qadhf* involves the right of God and therefore, the accused cannot pardon the accuser either before or after the issue has reached the authorities 3) *qadhf* does not involve the right of God until it reaches the authorities, consequently as Ibn al-Qasim had stated, the accused can pardon the person who slandered him before the issue has reached the authorities; after that, he is not allowed to give his pardon to the slanderer, unless he wants to conceal it.

2.5. *Ibn Rushd's Doctrine Reconsidered: Abu Bakr Ibn al-'Arabi and Qadi 'Iyad*

Two jurists of the generation subsequent to Ibn Rushd al-Jadd, one of them his student, introduced some relevant changes in a doctrine in which the need to protect the vulnerability of men's reputation had come to prevail over the need to protect the potential victim of a rape. To introduce these changes they did not resort to sophisticated legal reasoning but to very basic assumptions about how things happen in practice and about the kind of feelings the idea of rape arouses among common people. This shift shows a

remarkable awareness to keep the distance between doctrine and social reality under control. Probably, there is also some part to be attached to the personality of such charismatic figures of the Maliki school as were Qadi 'Iyad and Abu Bakr Ibn al-'Arabi and also to the spiritual and political crisis both jurists witnessed and endured. However, more than pointing to a turning point in the development of Maliki doctrine on rape, in my view the shift reflects the constant need to keep the balance to compensate the biases that doctrine adopts in its growth.

From an intellectual point of view, the most relevant change was that introduced by Abu Bakr Ibn al-'Arabi (al-Andalus, d. ca. 457/1148), who represents the first attempt at classifying rape not as a combination of *zina* and usurpation but as banditry (*hiraba*). Ibn al-'Arabi recounts that when he was *qadi* of Seville, a group of men was denounced before him for having performed acts of banditry against another group of men, and for having abducted one of the latter's wife. Given the seriousness of the accusation, they were captured and brought before the *qadi*. "I consulted the muftis with whom God afflicted me," regrets Ibn al-'Arabi, "and they held that the accused could not be assimilated with bandits since banditry applies only when patrimonial property is taken away, not women's private parts (*li-anna l-hiraba inna-ma takun fi l-amwal la fi l-furu*)" to which an infuriated Ibn al-'Arabi replied: "verily, we belong to God and to Him we will return! Don't you know that banditry perpetrated over women's private parts is more abominable than that perpetrated over patrimonial property and that people are ready to give up their properties if need be but a man would never surrender his wife or his daughter? Certainly, if there is a punishment that must be harsher than those prescribed by God this is the punishment for submitting women's private parts to pillage."³²

In fact, he was not mistaken as regards people's sensitivities concerning rape and the disruptive potential of neglecting them. At some point between 513 and 514/1119–1121 the people of Cordova revolted against the Almoravid governor of the town because he

³² See Abu Bakr Ibn al-'Arabi, *Ahkam al-Qur'an*, ed. 'A.M. al-Bajawi, Beirut, Dar al-ma'rifa, 1972, 4 vols, II, 597. See also Kh. Abou El Fadl, *Rebellion & Violence in Islamic Law* (Cambridge, U.K., 2001, 253) where the episode is ascribed to Ibn Rushd al-Jadd.

refused to punish one of his slaves who had abducted a Cordovan woman on the day of the feast of the sacrifice with the intention to rape her. In the course of the revolt, the Cordovans, led by their jurists and notables, plundered the dwellings of the Almoravid garrison of the town. The revolt took very serious dimensions and could be put an end only through the direct intervention of the Almoravid emir ‘Ali b. Yusuf b. Tashufin, who had to travel to Cordova from his capital, Marrakech,³³ the moral of the story being that violation of the female members of a community is the last people are ready to allow to an unjust ruler.

The doctrine advocated by Abu Bakr Ibn al-‘Arabi was accepted by later Malikis like al-Dasuqi (d. 1230/1815).³⁴ On the other hand, al-Shawi (d. 1240/1825) declares that in his time, the groups of men who raped women in Egypt were considered bandits.³⁵ There are much earlier testimonies as well, like the subsequent one. In theory, a conviction of *hiraba* for having raped a woman entailed cross amputation,³⁶ however, it might also end in the execution of the accused. This was the case of a nephew of the Fasi scholar al-Sulami (d. 603/1206) who was accused of having raped a woman after having brought her to his home against her will, as some witnesses declared. The highest Almohad religious authority in Fez (*hafiz*) ordered his detention and had him beheaded the next day before the morning prayer giving his uncle no time to intervene in his favor.³⁷

Abu Bakr Ibn al-‘Arabi was also concerned by the possibility that rape committed in territory of the enemy be considered an act of war and remained unpunished. It is true that according to Ibn al-Majishun (Medina, d. 214/829), if someone commits *zina*

³³ See the anonymous chronicle *al-Hulal al-mawshiyya*, ed. S. Zakkar and ‘A.Q. Zamama, Casablanca, Dar al-rashshad al-haditha, 1979, 86–7. See also Ibn al-Athir, *al-Kamil fi l-ta’rikh*, Beyrut, Dar sadir, 1339/1979. X, 558. An account of the facts in English can be found in H. Kennedy, *Muslim Spain and Portugal. A Political History of al-Andalus*, London and New York, 1996, 182–3.

³⁴ See A. Qurayshi, “Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective”, http://www.karamah.org/articles_quraishi.htm, online (28/08/06), section II, B..

³⁵ See Kh. Abou El Fadl, *ob. cit.*, 290. n. 172.

³⁶ See R. Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-first Century*, Cambridge, University Press, 2005, 58.

³⁷ See R. El Hour, “Al-Sulami”, in J. Lirola and J.M. Puerta (dirs.), *Biblioteca de al-Andalus*, V, Almeria, Fundación Ibn Tufayl de Estudios Árabes (forthcoming).

in the land of the enemy (*dar al-harb*) with one of their women, he is not subject to the *hadd* punishment, but inferring from this opinion, observes Ibn al-‘Arabi, that this action is licit (*halal*) amounts to ignoring the fundamental principles of the *shari‘a*. There is difference of opinion as to whether or not the *hadd* for *zina* is in force in the territory of the enemy, however, all agree (*fa-huwa muttafaq ‘alay-hi*) that committing *zina* in the land of the enemy with one of their women is forbidden.³⁸

In his commentary to the *Muwatta’*, Ibn al-‘Arabi does not mention the requirement of “holding the accused” at the moment of claiming rape,³⁹ which might indicate that he did not consider this requirement important, however he does mention it in his commentary to the *Sunan* of al-Tirmidhi, where he also tries to explain the absence of a reference to the right to receive the proper bride-price in the *hadiths* relevant to rape.⁴⁰

‘Iyad, however, does not hesitate in rejecting that “holding” the accused be decisive to accept a claim of rape in the lack of witness testimony since “not all raped women are able to catch the man who has raped them”. This he asserted once he was consulted about a woman who disappeared from her family and was absent for several days. When she came back she claimed that she had been in the mountains. She was then submitted to questioning and at that moment -according to the jurist who drafted the account of the facts- she declared that a certain man had abducted her. She subsequently was brought before the *qadi* who questioned her again in the presence of the *fugaha’* and at that moment she accused of rape one of the masters (*min arabab*) of her village, whom allegedly she had not mentioned before. Moreover, the *mustafti* stresses, “When she appeared she was not bleeding.” The accused denied the claim and presented witnesses that he had remained in the village during the time she had been absent and that there was certainty (*tayaqqun*) that she had been incited against him and that she had denounced him in bad faith. However, the accused was sent to prison and sentenced to receive a beating which he avoided by

³⁸ See *Ahkam al-Qur’an*, I, 516. See also al-Sha‘bi, *Ahkam*, 349.

³⁹ See *Kitab al-qabas fi sharh Muwatta’ Malik b. Anas*, Beyrut, 1992, III, 1011.

⁴⁰ See *‘Aridat al-ahwadhi bi-sharh Sahih al-Tirmidhi*, Beyrut, Dar al-kutub al-‘ilmiyya, 1997, chapter on *hudud*, section on the woman who is forced to commit *zina*. I thank Maribel Fierro for pointing me to this source.

paying the claimant a certain amount of money on the condition that she waive her claim.⁴¹ Then he was released. Presumably the man approached ‘Iyad with the intention to appeal the *qadi*’s decision, get his money back, have his reputation reinstated and the claimant punished for having falsely accused him.

‘Iyad seems to assume that for jurists like the petitioner of the fatwa, bleeding and holding the accused were essential for a claim of rape without witnesses to be given credit, which would point to a certain spread of the Maliki doctrine on rape as it had been presented by Ibn Rushd al-Jadd (see Appendix II, paragraph 2). In his short but substantial answer ‘Iyad minimizes the relevance of the bleeding as a sign of rape since as he observes “non-virgin women don’t bleed”. In his opinion in order that a claim of rape exonerates the claimant from the punishment of *zina* she must appear calling for help immediately after having suffered the aggression and hers must be a spontaneous claim. At that moment she must specify who has raped her and bear signs of having suffered as a result of having offered resistance. This is how the expression “holding [him] and bleeding” (*muta‘alliqā tadmi*) that can be found in the sources is to be understood: bleeding refers to the signs of violence and resistance still visible on the woman at the moment she presents her claim and “to hold” means to mention the accused by his name. The bleeding becomes a legal argument (*hujja*) only when the claimant is a virgin. On the other hand, ‘Iyad refers to the claim of rape with the verb *tashakkà* (to complain) instead of *idda‘à* (to claim, to denounce).⁴² This word selection would not call the attention had not the Zahiri jurist Ibn Hazm (al-Andalus, d. 456/1064) pointed out that an accusation of rape that cannot be substantiated must not be subject to the *hadd* for calumny in analogy with a non substantiated accusation of theft which is considered a complaint (*shakwa*) and not false accusation or calumny (*qadhf*).⁴³ ‘Iyad does not explicitly question the jurisprudence on false accusation of rape, much less does he acknowledge Ibn Hazm

⁴¹ An agreement that would meet Ibn al-Attar’s and Ibn Rushd’s aforementioned fears.

⁴² See Muhammad b. ‘Iyad, *Madhahib al-hukkam fi nawazil al-ahkam*, ed. M. Bencherifa, Beirut, 1990, 81–82; Spanish trans. and study by D. Serrano Ruano, *La actuación de los jueces en los procesos judiciales*, Madrid, 1998, 213–6.

⁴³ See Ibn Hazm, *Muhallà*, Cairo, 1928–34, XI, 291–3.

as his source, however through the use of “complaint” instead of “claim” he is in fact holding for circumventing the legal consequences of calumny, resorting to a terminological subtlety as jurists do when they want to introduce a change without explicitly declaring that they are doing so.⁴⁴

In sum, with a pen-stroke, an expression that is fully accurate given the brevity of ‘Iyad’s fatwa, he tries to remove one of the most important factors that might deter women from denouncing rape, i.e. the fear of being punished for calumny if their claim was not given credit. This might also be an implicit case of *talfiq* or resort to the doctrine of the jurist of another school when clinging to the school doctrine leads to an impasse.

In the source where the fatwa of Qadi ‘Iyad is transmitted, a commentary follows by his son, Muhammad b. ‘Iyad (d. 574/1179) which is in fact a very interesting summary of Maliki doctrine on rape.⁴⁵ In this summary several traits deserve to be mentioned: first his frequent references to the *Kitab Ibn al-Mawwaz* together with the *Mudawwana* and the *Uthbiyya*. Second, that he incorporates the opinions of later legal authorities like al-Sha‘bi, Ibn Sahl and al-Baji into the corpus of Maliki jurisprudence on rape. Third, his selection of legal opinions about questions on which there was difference of opinions, e.g. he transmits, without qualifications, that according to Asbagh, as had already been mentioned by Ibn Abi Zayd al-Qayrawani, the free woman must not be examined by other women in order to determine whether she has lost her virginity as a result of a rape or not since she is considered trustworthy and she must be given credit if she says that she has been raped or deflowered. He also mentions without refuting it another opinion issued by Asbagh—matching what has above been mentioned as the early opinion of Ibn al-Qasim and which he later abandoned—according to which if two witnesses declare that they have seen a man forcing a woman to commit *zina*, this testimony is valid to sentence him to the *hadd* for *zina*. With respect to defloration with a finger, Muhammad b. ‘Iyad considers that the opinion according to which the bride-price is to be taken as a basis to calculate the compensation to be paid to the victim, is the most correct

⁴⁴ This device is typical of the linguistic practice of Muslim jurists, as Kh. Abou El Fadl, *Rebellion & Violence in Islamic law*, Chapter 8, has analyzed it.

⁴⁵ See *Madhahib al-hukkam*, 82–84.

(*asahh*). Contrary to Ibn Rushd al-Jadd, he held in favor of not sentencing to death the *dhimmi* who rapes a slave Muslim woman. He also mentions an opinion by Abu Hanifa in which he established a distinction between the adult woman (*kabira*) and the minor girl on the grounds that the former can offer resistance and consequently is not entitled to the bride-price while the minor is entitled to it since she cannot offer resistance (*la tutiq*). I think that in citing this latter opinion Muhammad b. 'Iyad aimed less at questioning the right of the victim to receive the bride-price than at showing that he was acquainted with the doctrine of the other schools, a knowledge very much in trend in his time.⁴⁶ So much in trend that it was this period which saw the rise of the *Bidayat al-mujtahid*, one of the most authoritative references on difference of opinions (*ikhtilaf*) within Islamic law.

2.6. *Defining Rape for the First Time: Ibn Rushd al-Hafid*

Certainly Abu Bakr Ibn al-'Arabi had defined rape involving abduction as an act of banditry, which departs from his predecessors' conception of the crime. However, and notwithstanding that the rest of the Malikis shared similar assumptions about the nature and the consequences of rape, they had that far not defined the crime explicitly. This step was taken by Ibn Rushd al-Hafid, better known in the latin West under the name of Averroes (al-Andalus, d. 595/1198). He provided what might be called the "classical" Maliki definition of rape when he pointed out to the divergent opinions regarding rape and the reasons underlying them. Thus, when he explained the reasons why there was difference of opinion regarding the payment of the bride-price to the victim of rape, he established explicitly the basis for the analogy between rape and theft (an analogy that as we have seen above, affects the questions of suspicion and the legal consequences of the non substantiated claim). The reason for the analogy is that both rape and theft are crimes that involve the right of God and the right of men. In the particular case of rape, the *hadd* for *zina* settles the infringement of God's right while the bride-price pays off the private claim. Malik, al-Shaff'i

⁴⁶ See Fierro, "The Legal Policies of the Almohad Caliphs and Ibn Rushd's *Bidayat al-Mujtahid*," [*Journal of Islamic Studies*, 10/3 \(1999\), 226–48.](#)

and al-Layth held in favor of paying it on the grounds that, in analogy with theft, the claim of God did not cancel the private claim. However, for Abu Hanifa and Sufyan al-Thawri (Iraq, d. 161/778), the claim of God cancelled the private claim and consequently, payment of the bride-price does not apply. The Kufans, who did not consider that theft produced penal and financial liability at the same time, shared this latter opinion. The second reason the latter adduced not to hold the payment of the bride-price was that the bride-price was not a compensation for having sexual intercourse with the woman but a service to God (*'ibada*) that is fulfilled when the conditions under which marriage is concluded are in accordance with the *shari'a*.⁴⁷

Comparison among the doctrines of Malikis and non-Malikis thus led Averroes not to modify the doctrine but to reflect upon the general principles on which it relied, thereby improving its capacity to compete with the doctrines held by the rest of the schools.

2.7. *The Split of Maliki Doctrine on Rape: Khalil b. Ishaq and Ibn 'Asim*

With Abu Bakr Ibn al-'Arabi, Qadi 'Iyad and Averroes the process of elaboration of Maliki doctrine on rape can be considered complete at least as far as doctrinal growth is concerned. By then, the outlines of two tendencies can be noticed; the one restricting the acceptance of a claim of rape for which no witness testimony can be provided to the fact that the victim has managed to "hold the accused," a tendency to which subsequently I shall refer as the "traditional" trend; the other accepting the calls for help and other signs of violence and of lack of consent as valid circumstantial evidence of rape, to which I call the "alternative" trend.⁴⁸

Between the 12th and the 15th centuries an alignment with either of these two tendencies took place. To the first tendency belong Khalil b. Ishaq (d. Egypt, 767/1365) and Ibn Farhun (d. Medina, 799/1397). Khalil b. Ishaq is the author of the famous and authoritative abridgment of Maliki jurisprudence known as the *Mukhtasar*

⁴⁷ See Ibn Rushd al-Hafid, *Bidayat al-mujtahid*, ed. 'A.H.M. 'Abd al-Halim and 'A.R.H. Mahmud, Cairo, 1975, chapter on usurpation (*ghashb*).

⁴⁸ Using the same terms of Kh. Abou El Fadl's division of post 12th century Maliki doctrine on rebellion.

Khalil, on which numerous commentaries have been written. The authoritativeness of *Mukhtasar Khalil* draws on its being inspired in an earlier abridgment of Maliki doctrine whose author, Ibn al-Hajib, is said to have merged the Egyptian, the Andalusí and the Maghribi branches of the Maliki school. Also, in the *Mukhtasar Khalil* the majority opinion within the Maliki School is considered to have crystallized, which does not mean that the opinions propounded by Khalil were the ones that prevailed in courts.⁴⁹

Ibn Farhun wrote a manual for the instruction of *qadis* that became a classical in its genre. Being a book primarily directed to *qadis* one might assume from it a more precise reflection of the judicial practice than from Khalil's *Mukhtasar*. However the Maliki School was not dominant in Eastern religious courts as it was in the Maghrib and al-Andalus.

Both Khalil b. Ishaq and Ibn Farhun cling to the position according to which if the accused was a man of good reputation and the woman did not hold him at the moment of claiming rape, she might incur the *hadd* punishment for *zina*.⁵⁰

To the second tendency belong two Granadan jurists: Ibn Juzayy and Ibn 'Asim. Ibn Juzayy (d. 741/1341) wrote a treatise of comparative law in which he listed cries (*siyah*) and calls for help (*istighath*) among the valid signs (*amara*) to give credit to a claim of rape, without mentioning the requisite of holding the accused. Also he introduced a remark on coercion that may be interesting in connection with massive rape of the women of the enemy and with Abu Bakr Ibn al-'Arabi's concerns regarding rape in the *dar al-harb*. Ibn Juzayy recounts that Malikis do not distinguish between whether

⁴⁹ See H. Toledano, *Judicial practice and family law in Morocco: the chapter on marriage from Sijilmasi's al-'amal al-mutlaq*, Boulder, Colorado, Columbia University Press, 1981, 26, n. 65. See also R. Arévalo, *Derecho penal islámico. Escuela malekita*, Tangiers, 1939, 181–82. In fact, as far as Granadan legal practice is concerned, Mohamed Fadel has observed that between 1/4 and 1/3 of the fatwas issued by Granadan muftis in the XVth century represent opinions different from those transmitted in Khalil's *Mukhtasar*. See M. Fadel, *Adjudication in the Maliki madhhab: A Study of Legal Process in Medieval Islamic Law*, Ph.D., University of Chicago, 1995, 286–361, apud N. Vikør, *Between God and the Sultan. A History of Islamic Law*, London, Hurst&Company, 2005, 163.

⁵⁰ See *Il 'Muhtasar' Sommario del diritto malekita*, trans. D. Santillana and E. Guidi, Milan, 1919, II, 433 and 437 and Ibn Farhun, *Tabsirat al-hukkam*, Cairo, 1986, II, 167, 170 and 181.

the person who coerced was the sultan or another person, while for Abu Hanifa the *hadd* applies to the perpetrator in all situations except when the person who coerced him was the sultan.⁵¹

Ibn 'Asim (d. 829/1426) wrote an authoritative summary of Andalusí legal practice entitled *Tuhfat al-hukkam fi nukat al-'uqud wa-l-ahkam 'alà madhhab al-imam Malik* ("The present made to judges", book concerning some problematic questions of contracts and judgments according to the doctrine of Malik)" which has been the object of several commentaries⁵² and in which, for the first time, an independent chapter is dedicated to rape (*kitab al-ighṭisab*).⁵³ This might respond to the need for judges to have some easy and quick access to the relevant doctrine about rape, and hence, we can infer that either the crime was frequently denounced before them, or its adjudication used to give rise to doubts. Be that as it may, it seems clear that in daily judicial practice, rape was relevant enough to require to be treated apart.⁵⁴

The contribution of the chapter on rape of Ibn 'Asim's *Tuhfat al-hukkam* can be summarized as follows:⁵⁵ He who penetrates a free woman by force (*watī' li-hurra mughtasib^{am}*) must pay her proper bride-price if the fact that he penetrated her is established (*in yathbut al-watī'*), even if witnesses declare (*wa-law bi-bayyina*) [only] that he hid her and remained alone with her. The rapist incurs the *hadd* punishment when the victim is free or slave.

Given that Ibn 'Asim does not further specify this statement, a literal reading implies that the crime, and therefore the *hadd* punishment for the rapist, can be established with two witnesses from whom having seen the sexual act to its most intimate details is not required but just that the perpetrator "hid her and remained alone with her". That my impression is correct is confirmed by the fact that a late commentator of the *Tuhfa*, al-Tasulí or al-Tusulí

⁵¹ *Al-Qawānīn al-fiqhiyya, li-Abi l-Qasim Muhammad b. Ahmad b. Juzayy al-Kalbi al-Ghamatī*, Lybia, al-Dar al-'arabiyya li-l-Kitāb, 1982, 358, 361.

⁵² On which see H. Toledano, *Judicial practice*, 13, n. 14.

⁵³ See *Tuhfa*, ed. and French trans. O. Houdas and F. Martel, Algiers, 1882, 806–17.

⁵⁴ It is noteworthy that the *Tuhfa* includes a chapter on homicide, injuries, rape and theft but no chapter on the other *hudud* crimes, which might confirm that they were not adjudicated by Granadan judges.

⁵⁵ For a more detailed presentation and discussion of this doctrine see Appendix III.

(d. 1258/1842–3) saw fit to specify that in the aforementioned passage “the *hadd* applies only when the accused confesses to the crime or four witnesses declare to the perpetration of the rape.”⁵⁶ Furthermore, a reading of Ibn ‘Asim’s statement in connection with Muhammad b. ‘Iyad’s summary of Maliki doctrine on rape—in which he mentions the opinion of Asbagh according to which, two witnesses suffice to apply the *hadd* to the rapist—and with the fate of the nephew of al-Sulami, might suggest that in practice, the declaration of two witnesses was enough to sentence the rapist to the *hadd* for *zina*, and that al-Tasuli was not only explaining an ambiguity but trying to sort out the bias taken by the practice (which is one of the reasons why commentaries are written).

In the absence of witness testimony, what distinguished Ibn Rushd al-Jadd’s presentation was the centrality of the requisite of “holding the accused” while in the *Tuhfa* the doctrine on rape is articulated around the question of whether the claim is presented immediately or after a certain time, and this, to the detriment of the reputation of the claimant.

Between Ibn Rushd al-Jadd and Ibn ‘Asim there is a shift that seems to be related, again, with the banu ‘Iyad family, who appear to be in the origin of what I have called the “alternative” trend. Another sign of the connection between the fatwa transmitted in *Madhahib al-hukkam* and the *Tuhfa* is that the doctrine put forward by Ibn ‘Asim can be used to explain, point by point, the decisions taken by the *qadi* whose judgment was submitted to ‘Iyad’s consideration: the reason why he decided to imprison the accused and sentence him to beating must have been that he had a bad reputation despite his being “one of the masters of the village.” The reason why the woman’s claim was accepted notwithstanding that her claim was neither immediate nor spontaneous must have been that her reputation was good, while it is the delayed claim what might explain that no bride-price be awarded to her. Ibn ‘Asim’s endorsement of Iyad’s fatwa was not complete, however, given that Ibn ‘Asim goes on using the terms (*da‘wà, iddi‘a*) to refer to the claim of rape and upholds the jurisprudence of calumny.

The shift to the centrality of immediate or delayed claim, and the fact that even in the latter case the claim might be accepted

⁵⁶ See *Kitab al-Bahja fi Sharh al-Tuhfa*, Cairo, n.d., 2 vols., II, 335.

seems to point to an awareness that in many cases, a claim of rape was not spontaneous but a means to counteract an accusation of *zina* and, although it is not made explicit, an assumption that many women did not denounce the crime immediately because of fear or shame.

3. WHICH TREND PREVAILED IN PRACTICE?

For the sake of conciseness this paper should not take much longer. For the sake of narrativity Ibn ‘Asim’s *Tuhfat al-hukkam* is good to call a halt since it reflects the ultimate assimilation of the import of a fatwa into authoritative legal practice and hence into authoritative Maliki doctrine, a process that suggests some final considerations.

In principle, one should not assume without further verifications that the fact that a certain legal practice becomes authoritative for Maliki jurists amounts to widespread adoption of this practice in courts. The assertion that the *Tuhfa* reflects legal practice is true as far as the cases reported by Muhammad b. ‘Iyad and by al-Wansharisi is concerned, this being a *posteriori* reflection of legal practice. However we have seen other testimonies in which Maliki muftis’ position regarding actual cases of rape fit better in the “traditional” than in the “alternative” trend. On the other hand, how frequently accusations of rape were presented before the authorities is difficult to say with the sources we have at our disposal⁵⁷ and hence, we cannot derive statistical data as to which doctrinal trend prevailed in practice. However, an attempt at inferring the relevance of rape in legal practice can be made indirectly.

The fact that Ibn ‘Asim dedicates a chapter of his *Tuhfa* to rape might indicate, as has already been pointed out, that the crime had a certain relevance in the judicial practice, those aspects that were not relevant being left outside as might have been the case of banditry, wine drinking, apostasy, etc. If rape was relevant in judicial practice it must have been due to a certain frequency of denoun-

⁵⁷ For other local and temporal settings, e.g. 19th century Egypt, the rates fluctuate between 0.5 to 1.25 per cent of the cases adjudicated by the courts in both the *shari‘a* and the khedival legal system. See. L. Kozma, “Negotiating Virginity: Narratives of Defloration from late nineteenth-century Egypt”, *Comparative Studies of South Asia, Africa and the Middle East*, 24/1 (2004), 57–69, at 58.

ciations, which is possible only in a context in which claimants did not fear to be punished for calumny.

There is another indirect deduction that is pertinent to this connection: taking into account that the *Tuhfa* represents change and that changes in legal doctrine as a result of changing social or political conditions used to take place long after these conditions have come into existence, and in general, only when they become persistent and dominant,⁵⁸ we can infer that the practice reflected by the *Tuhfa* had been widespread much before the book was written. Inversely, the fact that the terminological shift from “claim” to “complaint” did not find formal acceptance in the *Tuhfa* does not mean that in practice claimants who could not duly demonstrate their accusations were punished with the *hadd* for calumny, the jurisprudence on *qadhf* having been kept symbolically to remind the seriousness of this crime and that in extraordinary circumstances, it might have harsh consequences.

4. CONCLUSIONS

15th century Maliki doctrine on rape was the result of the accumulation of personal contributions which in most cases had come to fill the gaps left by earlier generations of jurists, thereby expanding the scope of the doctrine. In some cases, jurists questioned transmitted opinions, either implicitly by rescuing alternative or minority opinions, or implicitly by nuances, reformulating or changing the traditional doctrine on specific points that stand in an unbearable divergence with social practice. Over time, some of these modifications were assimilated into authoritative doctrine and thus, changed it, a process that fits in the general pattern of growth and change of Islamic legal doctrine established by students of Islamic law.⁵⁹

⁵⁸ For all these assumptions I am drawing on Kh. Abou El Fadl, *Rebellion & Violence*, 161–3, 322–5 and 328–30.

⁵⁹ See B. Johansen, “Legal Literature and the Problem of Change: The case of the Land Rent” in Ch. Mallat (ed.), *Islam and Public Law. Classical and Contemporary Studies*, London/Norwell MA, 1993, 29–47; W. Hallaq, “The author-jurist and legal change in traditional Islamic law” in *Recht van de Islam*, 18 (2001), 31–75, *idem*, *Authority, continuity and change in Islamic law*, Cambridge, Cambridge University Press, 2001. See also Sh. Jackson, *Islamic law and the State: the Constitutional Jurisprudence of Shihab al-Din al-Qarafi*, Leiden, Brill, 1996 and Kh. Abou El Fadl, *ob. cit.*

In the first stages a series of legal opinions concerning claims to counteract an accusation of *zina* were transformed into a doctrine that allowed victims of rape to demand financial compensation and the perpetrator's punishment. This early doctrine awarded circumstantial evidence autonomous probative force in the lack of witness testimony. Once the fundamentals were laid down, the attention of the jurists focused on solving uncertainties and ambiguities in the question of circumstantial evidence. This might respond to the inertia of a doctrinal development aiming at widening its scope as much as possible. However, considering the testimonies of women who approached the authorities claiming that they had been raped, it seems to have also aimed at limiting the victims' possibilities of success—which seem to have been numerous—and at protecting those accused of the crime. By the end of the 10th century, circumstantial evidence lost autonomy in favor of reputation of which it was made to depend. The result was that men with a good reputation became practically immune from accusations of rape not supported by witness testimony. This stress on reputation and the bias in favor of the accused required to strike a new balance. The doctrine was then submitted to a process of revision that led some to further strengthen the bias by adding the requirement of “holding” the accused and placing it at the head of the list of admitted signs of rape. Others introduced the distinction between immediate or delayed claim. The revisions affected not only circumstantial evidence but also the definition of the crime, which was either likened to banditry, specially when abduction was involved, or made analogous to theft and eventually, disconnected from false accusation of calumny.

Beyond strict legal considerations, rape in Maliki doctrine was regarded as bringing dishonor (*maʿarra*) and shame (*fadihat nafsi-ha*), but these were considered, mainly, as the victim's individual concern. When rape becomes a collective issue it is to take the victims' sensitivity into account (e.g. advising the authorities to sell a rapist slave out of his victim's place of residence) or to make the perpetrator accountable not yet for *zina* but for the more serious crime of banditry. Dishonor and shame are assumed to produce sorrow to the victim and to her family but not social marginalization. Moreover, discussions about the need for the victim to complete the waiting period before being married suggest that

victims of rape were not necessarily rejected as wives. On the other hand, the fact that monetary compensation is awarded to virgin and non-virgin, slave and free, Muslim or non Muslim victims indicates that loss of virginity is the basis for calculating the compensation due while the reason underlying the right to receive the compensation is the usurpation of the right to have sexual intercourse with her.

APPENDIX I

Ibn Abi Zayd al-Qayrawani, *Nawadir*, XIV, 260–63

A) The accused is of bad reputation. In this case Malik held that he had to be punished with a severe corrective (*adab waji'*) independently of whether she had appeared bleeding or not. Regarding whether or not the proper bride-price must be paid in this case, there was difference of opinion: 'Abd al-Malik b. Habib and Ashhab held that she was entitled to it provided that she took the oath to her claim, while in similar circumstances Ibn al-Majishun restricted the right to receive the proper bride price to the free woman. Ibn al-Qasim for his part was contrary to the payment of the proper bride-price even if the accused was "more immoral than 'Abd Allah b. al-Azraq"⁶⁰, unless there were two witnesses that he brought her to a remote and isolated place (i.e. conclusive proofs of the abduction) and that when she came back, she denounced him thereby showing herself up. In this case, she becomes entitled to her proper bride-price if she takes the oath, he must be punished with a severe corrective and (it is noteworthy that Ibn al-Qasim feels the need to rule it out provided the existence of witness testimony) she must not be subject to any *hadd* punishment. Ibn Abi Zayd points out that this latter was also Malik's opinion, an assertion that must only apply to the payment of the proper bride-price since we have seen

⁶⁰ Ibn Rushd might be referring either to Nafi' Ibn al-Azraq, the leader of the Azraqides, or to another member of this group. The Azraqides are the most radical branch of the Kharijis. Among other thesis they held that those Muslims who refuse to join their cause are infidels and consequently, it is licit to kill them as well as their women and children, hence, probably, Ibn Rushd's sentence. See *EF*, s.v. "Azarika" [R. Rubinacci].

above that Malik was for punishing the accused if he had a bad reputation. For his part, Ibn Abi Zayd is not categorical either against punishing the accused of bad reputation in the absence of witnesses (like Ibn al-Qasim) or in favor of punishing him (like Malik) and submits the issue to the *imam*'s discretion.

B) The accused has a good reputation. If, at the moment of accusing him, she is holding him, the claim exonerates her from the *hadd* for *zina* in case she becomes pregnant because of the doubt (*lil-shubha*), but not from that for calumny. This was the opinion of Ibn al-Qasim and Ibn Wahb (Egypt, d. 197/812). Asbagh excluded from this rule the bleeding claimant (i.e. the woman who has lost her virginity as a result of the rape and is still bleeding when she presents her claim). However, 'Abd al-Malik b. Habib, Ibn al-Majishun and the disciple of the latter, Ibn al-Mawwaz, held that her claim exonerates her from the *hadd* for calumny as well; they thus don't distinguish between the accused of bad or good reputation and the bleeding or non bleeding claimant, and consequently acknowledge the autonomy of the claim formulated while holding the accused as valid circumstantial evidence to exonerate the victim from any penal liability. They show a certain regard for those victims who could not produce witnesses, led to an impasse by Ibn al-Qasim and Ibn Wahb's opinions since, if a woman is raped by a man of good reputation and denounces the crime immediately, all she can expect is to be exempt from the worst of two punishments, i.e. that for *zina*, if she becomes pregnant. However if she conceals the crime and subsequently becomes pregnant, she is subject to the punishment for *zina* and additionally, if she makes the mistake to claim that she has been raped to reject the accusation of *zina*, she may be subject to the punishment for calumny too.⁶¹

Ibn Abi Zayd transmits the legal rule applying to this latter case from Ibn Wahb for whom the woman who claims rape only when it is discovered that she is pregnant must be punished for *zina* and calumny, regardless of the accused's reputation.

⁶¹ This reasoning, that reflects my own appreciation of the facts, was already put forward by the Zahiri jurist Ibn Hazm, in his *Muhallà*, XI, 291–93. See also “*Zina*, Rape, and Islamic Law: an Islamic Legal Analysis of the Rape Laws of Pakistan”, quoting Ibn Hazm, *al-Muhallà*, Beirut, Dar al-kutub al-‘ilmiyya, XII, 260–1.

APPENDIX II

Ibn Rushd al-Jadd, al-Bayan wa-l-tahsil, XI, 234-6

1) A woman claims that she has been raped but at that moment she is not holding the accused. If the accused has a good reputation, she will be punished for calumny even though she is known for being a chaste woman. She will also be punished for *zina*, although in the opinion of Ashhab and Ibn Habib the latter punishment applies only if she becomes pregnant

If he has a bad reputation, she must not be punished either for calumny, regardless of her reputation, or for *zina*. If she becomes pregnant, the *imam* must put the accused in prison until his case is investigated and if something wrong is found about him, the *imam* must apply to him the punishment that he sees fit, but if nothing wrong is found out about him he must be released before he has sworn that he is innocent. If he refuses to take the oath, the claimant is entitled to her proper bride price if she swears to her claim.

If the reputation of the accused is unknown (*majhul al-hal*) but she was not known for being chaste she must be punished for calumny. If she was a chaste woman two possible opinions could apply: according to one of them, she must be punished for calumny, according to the other one, she must not. Those who hold that she must not be punished hold also that the accused must swear that her accusation is not true and if he refuses to do so, she would be entitled to her proper bride-price.

2) A woman claims that she has been raped by a man of good reputation and at this moment she is holding the accused. If she is a virgin and appears bleeding she will be exonerated from the punishment for *zina* if she is of those who have concern for their honor, even if the accused is a man of good reputation and even if she subsequently becomes pregnant, because when she held him at the moment to present her claim she showed herself up (a rule that does not seem to apply to non virgin women). With respect to the punishment for calumny, if the accused is of good reputation, there is difference of opinion. Ibn al-Qasim held in favor of punishing her and against her right to the proper bride price while Ibn Habib transmitted the contrary opinion, awarding her the right to the proper bride price if the accused refused to swear.

If she is of those who have no concern for their honor, there is unanimity that she must be punished for calumny if the accused has a good reputation. Had he a bad reputation, she would be exempt from the punishment for calumny and *zina*, even if she became pregnant. As regards the payment of the proper bride-price, there are three valid opinions: a) Ashhab transmitted from Malik that she had a right to it; b) 'Isà b. Dinar (Medina, d. 212/812) transmitted from Ibn al-Qasim that she had no right to it; c) According to Ibn al-Majishun she was entitled to it only if she was a free woman.

When she is entitled to receive the proper bride-price for having showed herself up, there is difference of opinion as to whether she has to swear or not before receiving it. Ashhab transmitted that it was not necessary while Ibn al-Qasim held that she had to swear. This latter opinion is, according to Ibn Rushd, more correct (*asahh*).

If it is not known whether the accused is of good or bad reputation, all agree that she must not be punished if she is of those who have concern for her honor. If she is of bad reputation, she must be punished according to some jurists, but she must not be punished according to others. In both cases, he is obliged to swear and if he refuses, she is entitled to her proper bride-price if she swears.

APPENDIX III

Ibn 'Asim, Tuhfa, 806-17

When the victim has no other evidence than her claim (*da'wà*), it is necessary to distinguish between several cases:

1) She accuses a man renowned for being pious, upright and virtuous. In this circumstance a distinction is to be made between the immediate claim and the delayed claim. In the latter case, she will be punished for calumny and if she becomes pregnant, also for *zina*, although according to the opinion the property of which is most evident (*al-azhar*) she will be punished for *zina* even if she does not become pregnant.

The aforementioned opinions apply also when the reputation of both the claimant and the accused is not known, or when it is known that she is not a chaste woman. However, if she is chaste,

the judge is allowed to opt either for exonerating the accused from any penal liability whether the accused swears or refuses to take the oath, awarding the claimant the right to her proper bride-price if she swears, or for punishing him. The case of the accused whose reputation is not known differs from that of the accused of good reputation in that no bride-price and no oath can be required from this latter.

When the claim is presented immediately after the crime has been committed she becomes completely exempt from the penalty for *zina* (*hadd al-zina yasqut 'an-ha mutlaq^{an}*) regardless of the reputation of both the claimant and the accused. However, reputation is relevant with respect to the punishment for calumny. If she has a good reputation or her reputation is neutral, i.e. neither good nor bad, she must be punished according to Ibn al-Qasim, without that the accused be obliged to take the oath. The judge may also opt to follow the opinion of those who do not hold in favor of punishing her, in which case the accused must be obliged to swear and if he refuses, the oath is transferred to the woman and if she swears, she is entitled to her proper bride price. However, if she is not chaste nor is she of good standing (*laysa la-ha sawn wa-la hal hasan*), there is unanimity that she must be punished for calumny, unless the reputation of the accused is uncertain and she is of those who are afraid of that which brings dishonor (*idha kanat tuwaqqi ma yasim*). And if his reputation is uncertain and she is of those who are not afraid of becoming dishonored, according to some she must be punished and according to some she must not be punished.

2) If she accuses a man who is known for being a libertine (*al-mushtahir bi-l-fisq*) it is necessary to distinguish again between immediate and delayed claim. If she denounces the crime immediately, for example while she is still bleeding, she is exempt from any punishment even if she becomes pregnant. As to payment of her bride-price, opinions differ: according to those who hold that she is entitled to it, which is the majority opinion, she must swear that her claim is true. In case of delayed claim, the claimant is likewise exempt from any punishment, unless she becomes pregnant, if the accused's reputation is uncertain. However, no bride-price can be demanded from him. If, after having imprisoned the accused and investigated him, nothing is found about him, he must be released once he swears that he is innocent and if he refuses, she will be entitled to her proper bride-price if she swears.